

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

NOV 25 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2008-0229-PR
)	DEPARTMENT B
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
MICHAEL A. FULLER)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20062551

Honorable Stephen C. Villarreal, Judge

REVIEW GRANTED; RELIEF DENIED

Barton & Storts, P.C.
By Brick P. Storts, III

Tucson
Attorneys for Petitioner

E C K E R S T R O M, Presiding Judge.

¶1 Pursuant to a plea agreement, petitioner Michael Fuller was convicted of sexual abuse of a minor and sexual conduct with a minor. The trial court sentenced him to a mitigated, 2.5-year prison term on the sexual abuse charge and a consecutive, presumptive,

ten-year term on the sexual conduct charge. Fuller subsequently filed a notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. Thereafter, his appointed counsel filed a notice of review pursuant to Rule 32.4(c)(2), avowing she saw no colorable claim to raise. The court granted Fuller leave to file his own petition for post-conviction relief within forty-five days and, when he did not, the court dismissed the proceeding on December 5, 2007.

¶2 Fuller then filed another notice of post-conviction relief on December 12, 2007. The trial court appointed different counsel, who timely filed Fuller’s petition for post-conviction relief in 2008. In that petition Fuller argued, *inter alia*, that his trial counsel had provided ineffective assistance by (1) failing to obtain a psychosexual evaluation to determine Fuller’s risk of recidivism; (2) failing to inform the court that Fuller “would fall under” Arizona’s sexually violent persons (SVP) statutes, A.R.S. §§ 36-3701 through 36-3717, which would sufficiently protect the public; and (3) inadequately presenting mitigating evidence and arguing the alternatives to a lengthy incarceration at sentencing. He also requested an evidentiary hearing to demonstrate his counsel was ineffective. The trial court summarily dismissed the petition following a status conference but did not explain its reasons for doing so.

¶3 In his petition for review, Fuller claims he presented a colorable claim of ineffective assistance of counsel below and the trial court abused its discretion in summarily dismissing the petition. *See State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990)

(trial court's ruling on petition for post-conviction relief upheld absent abuse of discretion). We find no abuse of discretion, however, because Fuller is precluded from seeking relief on this ground in this successive post-conviction proceeding. *See* Ariz. R. Crim. P. 32.2(a)(3) (relief precluded if claim waived in prior collateral proceeding); *State v. Spreitz*, 202 Ariz. 1, ¶ 4, 39 P.3d 525, 526 (2002) (when petitioner could have asserted ineffective assistance of counsel in earlier Rule 32 proceeding, claim precluded in subsequent proceeding).

¶4 Moreover, even assuming that his claims were not precluded, the record supports a finding that Fuller's trial counsel acted effectively. To state a colorable ineffective assistance claim, a defendant must establish that counsel's performance fell below objective standards of reasonableness and that any deficient performance was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). A colorable claim warranting an evidentiary hearing is "one that, if the allegations are true, might have changed the outcome." *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993). Tactical or strategic decisions, however, rest with counsel, *State v. Lee*, 142 Ariz. 210, 215, 689 P.2d 153, 158 (1984), and we will presume "that the challenged action was sound trial strategy under the circumstances." *State v. Stone*, 151 Ariz. 455, 461, 728 P.2d 674, 680 (App. 1986). Thus, "[d]isagreements as to trial strategy or errors in trial [tactics] will not support a claim of ineffective assistance of counsel as long as the challenged conduct could have some reasoned basis." *State v. Meeker*, 143 Ariz. 256, 260, 693 P.2d 911, 915 (1984).

¶5 As Fuller acknowledged in his petition for post-conviction relief, he received “a favorable plea” given the potential punishment he faced for his crimes. His plea agreement required him to serve 2.5 years on the sexual abuse charge and made probation available for the sexual conduct charge. Fuller’s victim was a six-year-old child, and his presentence report indicated he had been convicted of a sexual offense against another minor in Nevada in 1980. Nevertheless, the state recommended Fuller receive probation on the sexual conduct charge. Given those circumstances, counsel’s decision not to seek a psychosexual evaluation, thereby avoiding any unintended negative consequences, may be viewed as a wise tactical decision. By the same token, counsel’s decision not to “explain[]” to the trial court the role of the SVP statutes—laws with which the court was presumably familiar—may also be viewed as a reasonable strategic choice. *See State v. Ramirez*, 178 Ariz. 116, 128, 871 P.2d 237, 249 (1994) (judges presumed to know and follow law).

¶6 As to Fuller’s less specific assertions that counsel inadequately investigated his case and presented insufficient mitigating evidence at sentencing, these claims are belied by the record. Defense counsel presented supportive letters from Fuller’s daughter and a friend, and counsel emphasized that, unlike most offenders, Fuller had taken responsibility for his crimes, which the court expressly took into consideration. Indeed, in pronouncing sentence on the sexual conduct charge, the court observed: “I’m going to sentence . . . you [to] the presumptive term of 10 years. And, again, the only reason I’m not giving you the 15 is because I think you admitted responsibility”

¶7 Fuller has neither established that counsel’s performance at sentencing fell below accepted professional standards nor articulated how a different approach would have changed his sentences. Therefore, even if his claim were not precluded by Rule 32.2(a)(3), the trial court did not abuse its discretion in implicitly finding Fuller had failed to state a colorable claim of ineffective assistance of counsel and thus dismissing the petition summarily. Accordingly, although we grant review, we deny relief.

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

GARYE L. VÁSQUEZ, Judge

JOSEPH W. HOWARD, Judge